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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JASON MICHAEL FORRESTER,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari

To The Superior Court of California,
County of San Luis Obispo

HONORABLE STEPHEN B. SEFTON,
COMMISSIONER

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether extending the exposure to an enhancement under VC§23546 from 7 years to 10 years, after the initial 7 years has lapsed, violates the prohibition against Ex Post Facto laws in light of *Stogner v. California* (2003) 539 U.S. 607?

2. Whether the lapsing of the original exposure period of 7 years vested a right to a defense such that changing the statute to allow the State to plead the alleged prior deprived the defendant of the defense in violation of the Due Process clause?

3. Whether the prosecution of the enhancement violated the terms of the plea agreement from the first conviction?

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OPINIONS BELOW

The opinion of the California Court of Appeal Second Appellate District, is reported at (2007) 156 Cal.App.4th 1021.

JURISDICTION

The decision of the California Court of Appeal Second Appellate District, affirming the Superior Court of California, San Luis Obispo County was filed on November 8, 2007.

A timely petition for review by the California Supreme Court was denied February 20, 2008. Petitioner invokes the jurisdiction of this Court under 28 USC §1257 on the ground that his rights under Article I, Section 9, clause 3, of the U.S. Constitution, and Article I, Section 10, clause 1, of the U.S. Constitution, and Amendment 14, to the U.S. Constitution, have all been violated by the enforcement of the State Statute. In addition, the sentence based upon the enhancement is contrary to clearly established federal law in violation of 28 U.S.C. § 2254(d)(1), and resulted from an unreasonable determination of the facts in violation of U.S.C. § 2254(d)(2).

RELEVANT PROVISIONS INVOLVED

1. Article I, Sec. 9 of the U.S. Constitution:

> No Bill of Attainder or ex post facto Law shall be passed.

2. Article 1, Sec. 10 of the U.S. Constitution:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

3. 14th Amendment, Sec. 1 of the U.S. Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 28 U.S.C. § 2254(d)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

5. 28 U.S.C. § 2254(d)(2):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim··
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This case raises, for the first time, whether an enhancement statute can be revived without violating the Ex Post Facto prohibitions. The issues are strikingly similar to those raised in *Stogner v. California* (2003) 539 U.S. 607 which ruled that a statute of limitations could not be revived.

Petitioner was charged with violating California's DUI statute (VC§23152) including allegations of two prior violations of similar offenses ("wet reckless" under VC§23103.5) in January of 1997 and February of 2001. The use of the 1997 prior as an enhancement is the central focus of this Writ.

In January 1997, DUI offenders were exposed to an enhancement for 7 years pursuant to California VC§23546. Effective September 20, 2005, the statute was changed to extend the exposure period from 7 to 10 years.

On May 16, 2006, Petitioner timely filed a motion with the San Luis Obispo County Court to dismiss the prior convictions from the complaint. In a written opinion filed on October 2, 2006, the Motion was denied by the trial court judge.

On November 3, 2006, Petitioner filed a timely notice appeal with the Appellate Department for the San Luis Obispo County Superior Court. On March 23, 2007, the Appellate Department affirmed the trial court ruling.

Petitioner filed for, and was granted a Request for Transfer to the California Court of Appeal. After review of the Petitioner's appeal, the California Court of Appeal, Second District affirmed the Appellate Department decision. The opinion of the California Court of Appeal Second Appellate District, is reported at 2007 156 Cal.App.4th 1021.

On December 18, 2007 Petitioner then filed a timely request for review with the California Supreme Court. On February 14, 2008, Petitioner's request for review was denied.

The pertinent part of the record, including the trial court opinion, the appellate department opinion, and the court of appeal opinion are all duplicated in the Appendix hereto, pursuant to Superior Court Rule 14.1(g).

REASONS FOR GRANTING THE PETITION

1. *California has failed to recognize the Constitutional protections against Ex Post Facto enhancement statutes and the effect of the U.S. Supreme Court holdings in Stogner v. California (2003) 539 U.S. 607.*

A. The Trial Court's Ruling

The trial court refused to recognize the obvious conflicts between the many holdings within the thorough U.S. Supreme Court's 47 page decision in *Stogner* and the flippant holdings within the California Court of Appeal's 5 page decision in *Sweet*. In pertinent part, the trial court made the following ruling in its written opinion:

> "Taken in its literal interpretation, the Court in Stogner said no more than legislation allowing prosecution of time barred claims violates the ex post facto clause of the Constitution." (Pg. 5, Par.2.)

In fact, the U.S. Supreme Court in *Stogner, Supra* (hereinafter *Stogner*) said a great deal more than that, and made several pertinent rulings in direct conflict with *People v. Sweet* (1989) 207 Cal.App.3d 78 (the California case relied upon by the California Courts, hereinafter *Sweet*). Yet it stated:

> "In summary, *People v. Sweet* is controlling authority in this case and its holding is unaffected by the holding in [The United States Supreme Court decision] *Stogner*." (Pg.5, Par.3.)

B. The Appellate Department Opinion

The Appellate Department pointed out that recidivist statutes are not a violation of the ex post facto prohibition per se, citing a string of cases. (Pg.2, Par.5). But it failed to note that none of those cases dealt with a defendant which had previously been exposed to a recidivist statute which was revived after the exposure period had lapsed. Instead, the Appellate Department focused on the fact that the defendant had committed a new crime (a fact which is sure to be present in every case dealing with a recidivist statute).

The Appellate Department failed to acknowledge the crucial fact that the Defendant had already been exposed to an enhancement period which had lapsed. In pertinent part it stated:

> "*Stogner* does not change the outcome of this case. There is a critical difference, one of Constitional dimension, between reviving a prosecution in its entirety (the situation in *Stogner*) and enhancing the sentence in a new

> criminal prosecution based upon new criminal conduct (this case). Unlike the situation in *Stogner*, Mr. Forrester has never been free of criminal liability."

But Forrester *has been* free from the criminal liability sought – a *minimum* jail sentence. He was free from that prosecution once the original exposure period lapsed.

C. The Court of Appeals Opinion

The Court of Appeal, Second Appellate District originally decided *Sweet*, and wasn't about to admit it's holdings were flawed simply because the U.S. Supreme Court made contrary holdings. Instead, it played the label game – attempting to make a distinction between a statute referred to as a "statute of limitations" and the one here, referred to as an "enhancement statute." It stated:

> "Here Forrester's prosecution stems from a law that became effective more than a year before the date of his arrest, and one that appraised him of the possible consequences of a new violation. Unlike *Stogner*, Forrester has not been charged with a crime for which the statute of limitations has run. He has not been deprived of a "vested defense" because the statute extending the maximum period of prior offenses was enacted before the current offense."

D. New Enhancement Statute Violates Ex Post Facto Clauses Just Like New Statute Of Limitations

i. Category 2:

The application of the new statute violates category 2 described in *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, as it was understood by the U.S. Supreme Court in *Stogner*.

Appellant was not subject to a *mandatory* minimum sentence which included 120 days of custody, once the original exposure period of 7 years had lapsed. But for the change in the statute the State would be barred from pleading an irrelevant prior (one older than 7 years).

The Court in *Stogner*, recognized that reviving punishments which have already expired inflicts punishment "for past criminal conduct that ... did not trigger any such liability." Id, at 613. The new statute here attempts to revive a punishment, the mandatory minimum sentence of 120 days custody in the same way the statute in *Stogner* revived punishment.

The *label* applied to the type of statute as an "enhancement" as opposed to a "statute of limitations" is not dispositive. *Weaver, v. Graham* (1981) 450 U.S. 24

The opinion in *Stogner* did not *only* find that an increased "statute of limitations" to be an ex post facto law, but instead found *all* "laws reviving time-barred prosecutions are ex post facto". *Supra*, at 607, 617, and 627. Therefore, the revival of a prosecution which is time-barred (one alleging the prior as an enhancement) is prohibited.

ii. Category 3:

The new statute changes the punishment, and inflicts a greater punishment, than the law annexed to the prior DUI crimes, when committed. At the time of the 1997 offense, the period of time that the defendant was exposed to a mandatory custody sentence of 120 days for a future offense was 7 years. The new statute increases that exposure period to 10 years. An increased exposure period adds on 3 years of exposure to the 120 day minimum sentence.

iii. Category 4:

Here, the new statute changes the rules of evidence to receive different evidence because it allows the prosecution to allege and prove a prior older than 7 years old when it would not have been able to so plead prior to the new statute's enactment. The *Stogner* Court reasoned:

> "Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would "violate" previous evidence-related legal rules by authorizing the courts to "'receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted]'" as sufficient proof of a crime...".

Here, to resurrect the exposure to the enhanced penalty, is to "eliminate a currently existing conclusive presumption forbidding" the pleading of the prior offense and permit an increased punishment "on a quantum of evidence where that quantum, at the time the new law [was] enacted, would have been legally insufficient".

The statute revives the procedural ability of the State to plead the 1997 prior. By doing so, the statute makes the 1997 prior relevant which would otherwise not be relevant.

E. The Lapse Of The Exposure Period Vested A Defense To Prosecution Of The Enhancement Just Like Lapse Of Statute Of Limitations Vests A Defense To Prosecution Of That Crime

Sweet held that the Ex Post Facto doctrine does not apply to a statute of limitations. *Supra*, at page 84. The U.S. Supreme Court in *Stogner* held the reverse, specifically striking down a statute of limitations on ex post facto grounds.

The argument that the defendant had a "vested right" to a defense was rejected in *Sweet* when that Court stated: "[W]e are unpersuaded that appellants... had a 'vested right'". *Supra*, at 85. However, the majority opinion in *Stogner* clearly recognized a vested right where a statute of limitations period had lapsed. The *Stogner* Court cited:

> "Cf. *Thompson v. State*, (1877) 54 Miss. 740 (stating, without specifying further grounds, that a new law could not take away a vested statute-of-limitations defense); *State v.*

> *Cookman* (1994) 127 Ore. App. 283 (holding that a law resurrecting a time-barred criminal case "violates the Due Process Clause" "),... *Commonwealth v. Guimento* (1985) 341 Pa. Super. 95 (enforcing a state ban on *ex post facto* laws apparently equivalent to the federal prohibition); *People v. Chesebro* (1990) 185 Mich. App. 412 (reciting "the general rule" that, "'where a complete defense has arisen under [a statute of limitations], it cannot be taken away by a subsequent repeal thereof'")." *Supra*, at page 617 and 618.

Sweet didn't even use the correct test to decide the Ex Post Facto issues. It used the "disadvantage formula." The case of *Collins v. Youngblood* (1990) 497 U.S. 37 clarified that such a test was flawed. However, at the time the ex post facto issues were visited by the California Court of Appeal in *Sweet* in 1989, the correct test was not yet underlined by the *Collins* decision.

2. *California failed to properly recognize federal law requiring interpretation of the plea agreement from the 1997 prior in favor of the defendant.*

The trial court ruled that the plea form executed by defendant in his 1997 case did not constitute a contract which promised a 7-year limit to exposing the defendant to the 120-day minimum penalty for subsequent offenses. It stated:

> "Here, the language of the agreement is clear and unambiguous. Paragraph 5 reflects minimum and maximum sentences that were

> applicable at the time of the 1997 conviction. The category of "OTHER" simply is not part of the minimum and maximum sentence. Looking objectively at the surrounding circumstances it is unrealistic to conclude that the court and the prosecutor waived the application of future amendments of Vehicle Code section 23546 particularly where the Legislature had previously amended the statute's look back period to 7 from 5 years. Likewise, it is impractical to think that the parties can enter into a contract that effectively prohibits or prevents the Legislature from exercising its right to enact, as shown above, lawful statutes. Even if there was a valid contract limiting the prosecution to a seven year look back period for any subsequent DUI conviction of Forrester, the public purpose would override that contractual limitation." (Court's Ruling Pg.10, Par.1-2.)

The factual determination that the plea agreement clearly and unambiguously did *not* contain a term which limited the exposure period to 7 years is an unreasonable determination of the facts in violation of U.S.C. § 2254(d)(2). Paragraph 5 of the plea agreement specifically referred to minimum penalties, to which the defendant would be exposed, should he violate a DUI statute *within the next 7 years.*

According to the trial court's interpretation, mentioning what minimum penalties exist for crimes within 7 years is meaningless because the same may hold true for those committed in 8 years, 9 years, or 10 years later. Why would the contract single out a

reference only to those within 7 years, if the 7 year period had no significance? It wouldn't, and thus the trial court's factual determination that the agreement is unambiguous is unreasonable.

Moreover, the California court must interpret the ambiguity over this 7-year language in favor of the party which did not draft it – the Defendant in this case. See *United States v. Transfiguracion* (2006) 442 F.3d 1222; 2006 U.S. App. LEXIS 8176, and *Buckley v. Terhune* (2006) 441 F.3d 688; 2006 U.S. App. LEXIS 6612. The *Transfiguracion* Court said:

> "One tenet of contract law we *have* steadfastly applied to plea agreements... is... the principle that ambiguities in contracts "are to be construed unfavorably to the drafter." BLACK'S LAW DICTIONARY 328 (7th ed. 1999). In context of plea agreements, the government is usually the drafter and must ordinarily bear the "responsibility for any lack of clarity." *Franco-Lopez*, 312 F.3d at 989 (internal quotation marks omitted). Ambiguities are therefore construed "in favor of the defendant." *Id.* (internal quotation marks omitted)..."

The Defendant did not draft the chart which indicated the future minimum penalties. Therefore, the proper interpretation is that the contract *did* limit the application of those *minimum* penalties to only offenses committed within the next 7 years.

The *Transfiguracion* Court went on to say:

> "As a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made, *United States v. Packwood*, 848 F.2d 1009, 1012 (9th Cir. 1988), so that "[t]he government gets what it bargains for but nothing more," *United States v.Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994)."

The State got more than it bargained for here. It was allowed to expose the defendant to the 120-day custody penalty as a *minimum* penalty for an offense committed more than 7 years later.

Therefore, the trial court interpreted the ambiguous terms in error by interpreting them in favor of the prosecution. By doing so, the trial court's interpretation of the plea agreement was contrary to clearly established federal law in violation of 28 U.S.C. § 2254(d)(1).

CONCLUSION

The Defendant respectfully requests that the Petition for Writ of Habeas Corpus be granted, and that the Writ issue.

Respectfully submitted,

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APPENDIX

I. Opinion from Trial Court Judge on original motion filed with the Superior Court.

II. Opinion from Appellate Department Justices of the San Luis Obispo County Superior Court.

III. Opinion from the California Court of Appeal, Second District, (2007) 156 Cal.App.4th 1021.

IV. Denial of Petitioner's request for review by the California Supreme Court.

SUPERIOR COURT, SAN LUIS OBISPO COUNTY San Luis Obispo Branch, County Government Center, 1050 Monterey Street Room 220, San Luis Obispo, CA 93408 x Paso Robles Branch, 549 10th Street, Paso Robles, CA 93446 Grover Beach Branch, 214 South 16th Street, Grover Beach, CA 93433	For Court Use Only FILED OCT 02 2006 San Luis Obispo Superior Court /s/ S. St. John, Deputy Clerk
People of the State of California, Plaintiff, v. Jason Michael Forrester, Defendant.	Docket No. M385438A
Ruling on Motion to Strike Prior Complaint	

FACTS

The People's amended complaint charges defendant with a violation of Vehicle Code Section 23152 (a) and (b) that occurred on or about March 11,2006. The amended complaint further alleges that defendant has two prior convictions of Vehicle Code Section 23105.5, one in January 1997 and the other in February 2001. Those prior convictions can serve as an enhancement of any conviction of the March 2006 offense pursuant to the current version of Vehicle Code section 23546.

Defendant's motion to strike is based upon the contention that use of the 1997 conviction, as allowed under the current version of Vehicle Code section 23546, violates the ex post facto clause of the US Constitution, Article I, section 10.

In 1997, Vehicle Code section 23546 allowed the court to consider DUI convictions that occurred within 7 years prior to the subject conviction for the purpose of enhancing sentences. Effective January of 2005, Vehicle Code section 23546 was amended to allow the court to consider convictions that occurred 10 years prior to the current offense, thereby

increasing the original 7 year period. Defendant contends that the court's ability to consider the 1997 conviction expired and use of the current 10 year period violates prohibitions against ex post facto legislation.

APPLICABILITY OF PEOPLE v, SWEET
(1989) 207 Cal App. 3d 78

The defendant acknowledges that *People v, Sweet.* (1989) 207 Cal. App, 3d 78 is the controlling authority on the issue presented here. To avoid the impact of Sweet, Defendant contends that the opinions in *Sweet* on the subject are mere dicta and should not be followed. Alternatively, defendant contends that the opinion in *Stogner v. California* (2003) 539 U.S. 607, has impliedly overruled the holding in Sweet.

The court in *People v. Sweet* was confronted with the 1986 amendment to Vehicle Code 23546 where the legislature increased the time period for the court to consider prior convictions from 5 to 7 years. *People v. Sweet*, dealing with the exact problem we are confronted with here, held that Vehicle Code section 23545 did not violate Ex Post Facto laws.

The defendant urges the court to disregard the holding in *Sweet* as dictum because the opinion did not clearly indicate that the prior conviction was between 5 and 7 years of the current conviction. If the prior conviction was committed within 5 years of the current conviction, the court's discussion of the implications of the 1986 amendment on the ex post facto prohibition was unnecessary and therefore, dictum. The argument is without merit.

The court in *Sweet* summarized the appellant's position as follows: "Appellants claim that use of their prior conviction over five years before the current offense, though less than seven years is barred" (*People v. Sweet*, supra., 207 Cal.App. 3rd at page 81) The court clearly considered a conviction that occurred between the 5th and 7th year of the then present conviction. Consequently, *Sweet* is directly on point.

Defendant' relies on *Stogner v. California* (2003) 539 U.S. 607 to establish that Sweet is impliedly overruled.

In *Stogner,* the defendant had been charged with crimes of sexual child abuse occurring between 1955 and 1973. The legislature enacted legislation that revived time barred claims. The applicable limitations period for claims against *Stogner* had run over 22 years prior to the date the prosecution was initiated. The US Supreme Court held that the legislation violated the ex post facto clause of the US Constitution.

First, the defendant contends that the *Sweet* court did not properly recognize that the punishment of the present conviction, based on both prior and subsequent offenses, aggravated the subsequent offense, "'in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct. .. '(*Stogner v. California*, supra, 539 U.S. at 613)."

Stogner stated, "After (but not before) the original statute of limitations had expired, a party such as *Stogner* was not 'liable to any punishment.' California's flew statute therefore 'aggravated' *Stogner's* alleged crime, or made it "greater than what it was, when committed, 'in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the law was enacted) did

not trigger any such liability." *Id.*.

Vehicle Code section 23546 imposes no new or additional punishment for a previous crime. That section reads in pertinent part, "If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of two separate violations of Section 23101, as specified in Section 23 J 03 .5, 23 J 52, or 23 153, or any combination thereof, that resulted in convictions, that person shall be punished ... " by enhanced penalties. "There is no constitutional bar preventing application of the statute to later offenses solely because the prior conviction which serves as a basis for enhancement was committed before the habitual offender statute was enacted." (*People v. Sweet* (1989) 207 Cal. App.3d 78,83; *People;. v. Mesce* (1997) 52 Car. App, 4th 618, 623-624). The statute enhances the punishment for the commission of a present crime and has no bearing on the punishment previously ordered and served for all original offense. In other words, Vehicle Code section 23546 speaks to the conviction of a present offense and does not renew or revive the ability to punish a defendant for the crime committed within the previous 10 years.

Defendant contends that the court in *Sweet* improperly described an extension of the "limitations period as procedural, as if the linguistic distinction would foreclose ex post facto analysis." This interpretation is inaccurate. In fact, the Court concluded that a limitations period is substantive and bars prosecution if criminal acts occur outside the statutory period for prosecuting the crime. (*People v. Sweet*, supra, 207 Cal. App. 3d at page 84). Similarly, statutes which modify the effects of a defendant's probation have been held to violate the ex post fac.10 clause because, as with a limitations period, it,

"affects the substantive rights and deprives the defendant of a protection he became entitled under [a] previous statute." (*People v. Sweet*, 207 Cal. App. 3d at page 84). Neither circumstance applies here. The enhancements under Vehicle Code section 23546 do not punish the defendant for a crime previously committed, nor alter the punishment previously imposed and completed. One cannot say that if a defendant was driving a vehicle in 2006 with excessive alcohol 1 in his or her system that he or she could be convicted under Vehicle Code section 23546. The offense is described in Vehicle Code section 23152(a) and (b). Vehicle Code section 23546 merely enhances the punishment for that offense. There is simply no impact or effect on the prior conviction of a person driving a vehicle in violation of the DUI statutes.

Lastly, the defendant argues that the Court in *Sweet* did not consider the question of proof. Citing *Stogner v. California*, supra, 539U.S. at 616, Defendant states "...specifically, the Court did not address whether the legislative amendment by resurrecting the prior convictions, in effect, 'authoriz[ed] the courts to receiv[e] evidence...which the courts...would not [previously have]admitted]' as sufficient proof of the prior conviction."

The ability to prosecute a crime is not resurrected here. The defendant was convicted of driving under the influence in 1997; a sentence was imposed and served. None of these facts are required to prove that the defendant committed a violation of Vehicle Code section 23152(a) or (b) on the day cited. More importantly, the defendant conveniently substitutes the word "conviction" for the "crime" in discussing the statement by the Court in *Stogner*. Taken in its literal interpretation, the Court in

Stogner said no more than legislation allowing prosecution of time barred claims violates the ex post facto clause of the Constitution. Conviction of the defendant for a current offense is not dependent on the conviction of the defendant of a similar crime1997.

In summary, *People v. Sweet* is controlling authority in this case and its holding is unaffected by the holding in *Stogner.*

IS THERE OTHER AUTHORITY SUPPORTING DEFENDANT'S POSITION?

Notwithstanding the applicability of *Sweet*, the defendant takes the position of that *John L. v. Superior Court* (2004) 33 Cal.4th 158) supports his position that the current amendment to Vehicle Code section 23546 is ex post facto legislation because it is retrospective in nature and fails two criteria described in *Calder v. Bull* (1778) 3 U,S. (3Dall.) 386.

The court in *John L.* states, "Both this Court and the Courts of Appeal have long held that someone who was convicted and sentenced for one crime, and commits a new crime or other misconduct while either on conditional release or in custody for the original conviction, is subject to new penalties and adverse procedural laws enacted between the time of the two acts." (*John L. v. Superior Court,* supra, 33 Cal. 4th at page 174). [1]

The same is logically true for someone, such as the defendant, who has been convicted. sentence and completed the punishment for a DUl and then charged with a subsequent, yet similar, crime after

[1] See footnote 5 of *John L. v. Superior Court*, surpra, 33 Cal.4th at page 213 where the Supreme Court cites a number of cases supporting this proposition

legislation increasing punishment for that crime. See *People v. Mesce* (1997) 52, Cal. App. 41k 618,632 where the court observed that the Legislature may properly view recidivism as grounds to enhance penalties.

In an effort to distinguish *John L.* and the supporting authorities it cites, Defendant relies on *People v Mesce* (1997) 52 Cal. App. 4th 618 to establish that. unlike recidivist enhancement statutes, Vehicle Code section 23546 violates the ex post facto clause.

Mesce was convicted of misdemeanor assault. Thereafter, the legislature enacted a statute making it unlawful for a misdemeanant such as *Mesce* to carry a firearm within 10 years of a conviction. *Mesce* was subsequently convicted on a new charge of assault with a deadly weapon involving use of a firearm. The *Mesce* Court reasoned that there is no ex post facto concern when a person is convicted of crime A and is subsequently convicted of crime B after a habitual criminal statute was enacted following the conviction of crime A.

Defendant states that the existence of Vehicle Code Section 23546 imports an additional element, C. Thus, Defendant reasons, the instant case is distinguishable from *Mesce.* because there was already a recidivist statute in effect when the legislature changed the look back period from 7 to 10 years.

The distinction raised by defendant docs not justify the court to disregard *Mesce*, particularly in light of *People v. Mills*, (1992) 6 Cal. App.4th 1278.

In *Mills*, defendant was convicted on a marijuana charge which prohibited him from thereafter possessing a concealed weapon under Penal Code section 12021. After that date, the

legislature amended Penal Code section 12021 by making it unlawful for a person convicted of marijuana possession from carry any firearm, concealable or otherwise, *Mills* was convicted for possessing a shotgun and the amendment to Penal Code section 12021 was held not to be ex post facto. Just as Penal Code 12021 was in existence and amended in *Mills*, Vehicle Code section 23546 was in existence at the time of Defendant's 1997 conviction and amended, causing defendant to be subject to enhanced penalties if subsequently convicted after the amendment *Mills* and *Mesce* dictate the outcome in this case.

The defendant's final position regarding ex post facto concerns rests on the principles expressed in *Calder v. Bull.* supra, as analyzed in *Stogner v. California,* supra. First, Forrester contends that Vehicle Code section 23546 aggravates the crime he committed in 1997, or otherwise makes its consequences greater then when it was committed. The result, then, brings into play category 2 under *Calder v. Bull,* supra.

Category 2, referenced in *Calder.* provides that a law is ex post facto if a statute inflicts punishment where the defendant was not, by law, liable to any punishment. (*Stogner v. California* 539 U.S. at 612). The difficulty with the defendant's arguments is that Vehicle Code section 23546 docs not punish the defendant for his conduct occurring in 1997, but punishes the conduct occurring in 2006. (*People v. Mesce* (1997), 52 Cal. App. 4111618, 624, 625, 626; *People v. Mills* (1992) 6 Cal. App. 4th 1278, 12lS5; *John L. v. Superior Court* (2004) 33 Cal. 4th 158, *People v. Sweet* (1989) 207 Cal.App. 3d 78,87; *Stogner v. California* (2003) 539 U.S. 607, 613).

Next, the defendant contends that the 4th category in *Calder* causes Vehicle Code section 23546 to be ex post facto. The defendant believes that this statute alters, "the legal rules of evidence, and receives less, or different testimony, then the law required at the time of the commission of the offense in order to convict the offender." (*Stogner v. California* 539 U.S. 539 607, 615).

John L. v. Superior Court, 33 Cal.4th 158 at 179, summarized the above described *Calder* standard as follows: "...the proscribed retroactive change is one affecting the criminal trial for the act subject to ex post facto protection. The fourth *Calder* category (Citations omitted) is limited on its face to amendments reducing the quantum of evidence or otherwise easing the burden of proof required to 'convict' someone of a charged crime." (Emphasis added)

Vehicle Code section 23546 does not define a crime for which a person can be convicted. It is a statute that enhances punishment for a crime. As a result, the 4th *Calder* category simply does not apply.

DID THE COURT. THE PROSECUTOR AND THE DEFENDANT ENTER A CONTRACT PROHIBITING ENFORCMENT OF A 10 YEAR LOOK BACK PERIOD?

Defendant's final argument is that the plea form executed by the defendant constituted a contract which promised a maximum look back period for subsequent DUI offenses to 7 years. This reliance apparently predicated on the language in paragraph 5 of the plea form which states in pertinent part that the court and defendant's counsel have advised him, to his satisfactory understanding of the "elements of

the offense, the possible defenses, and the direct consequences of [his]plea including minimum and maximum sentences set forth below." (Emphasis added). Page 3 of the plea form sets forth a chart describing penalties for driving under the influence effective January 1, 1994. Below that is another chart entitled "PENALTIES FOR RECKLESS DRIVING (§23103 UNDER §23103.5)," containing categories of "NATURE OF OFFENSES," which describes reckless driving as a reduced offense from a DUI; "MINIMUM AND MAXIMUM SENTENCES," which sets forth the jail terms and fines possible with or without probation; and a category entitled, "OTHER," which specifies that penalties will increase on a subsequent DUI conviction within 7 years.

If the plea form constitutes a contractual agreement, as opposed to a mere advisement of potential consequences as a matter of law at the time of a plea, our Supreme Court in *People v. Shelton* (2006) 37 Cal.4th 756, 767, describes the following rules to be applied:

> "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principals. (Citations omitted) The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' (*Id.*, 1649, other citations omitted.) 'The mutual

> intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code §§ 1635-1656; Code of Civ. Proc., 1859-1861; 1864;"

Here the language of the agreement is clear and unambiguous. Paragraph 5 reflects minimum and maximum sentences that were applicable at the time of the 1997 conviction. The category of "OTHER" simply is not part of the minimum and maximum sentence. Looking objectively at the surrounding circumstances it is unrealistic to conclude that the court and the prosecutor waived the application of future amendments of Vehicle Code section 23546 particularly where the Legislature had previously amended the statute's look back period to 7 from 5 years. Likewise, it is impractical to think that the parties can enter into a contract that effectively prohibits the legislature from exercising its right to enact, as shown above, lawful statutes.

Even if there was a valid contract limiting the prosecution to a 7 year look back period for any subsequent DUI conviction of Forrester, the public would override that contractual limitation.

"Assuming 'the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation ... such as the remedying of a broad and general social or economic problem ... [T]he

public purpose need not be addressed to an emergency or temporary situation ... [¶] Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislations] adoption.' (Citations omitted). "'[A]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. '" (Citations omitted). *Hull v. Butte Home Health, Inc.,* (1997) 60 Cal.App. 4th 308, 321.

In accordance with Assembly Bill 757, Chapter 450, 1989 Legislative Session, the Department of Motor Vehicles(DMV) prepares a report entitled Annual Report of the California DUI Management System. According to the report, in 2004 there were 180,957 arrests for driving under the influence or alcohol or drugs. Alcohol related reckless driving convictions amounted to 13,973 Of these were 133,143 convictions. According to the report in 2004 convictions amounted to 13.973. Deaths resulting from alcohol related driving equaled 1462, being over 35% of all traffic related fatalities, an increase of 1.2% from 2003, In 2005, California led the nation in deaths arising from alcohol related driving accidents. (http://madd.org/sats/11087; http://madd.org/stats110213). In addition, over 31,000 injuries occurred in 2004.

Equally alarming is the cost associated with alcohol and drug impaired driving. In 1999, the estimated cost incurred by the public for alcohol and drug related accidents was $12 billion, 55.5 of which being direct economic cost!' and $6.5 billion being

quality of live costs. (http:www.nhtsa.dot.gov/people/injury/alcohol/impaired driving pg2/CA.htm). With these costs undoubtedly being higher today and California accounting for approximately 10% of all alcohol related traffic deaths in the Country in 2005, the cost to Californians is more than $55 million for actual costs and $65 million for quality of life costs. (http://madd.org/stats/1784; http://madd.org/stats/11087; http://madd.org/stats/10213; http://www.nhtsa.dot.gov/people/injury/alcohol/impaired driving pg2/CAhtm).

The most important tact as it relates to a justification for the legislature to amend Vehicle Code sections 23540 and 23546 is that there is a direct relationship to license suspension and reduction of subsequent accident and our recidivism rates of drunk drivers. (See DMV Drunk Driving and License Suspension Policy at http://www.dmv.ca.gov/about/profile/rd/rdc4.htm).

For these reasons, there is a significant and legitimate public purpose behind the amendment Vehicle Code §§ 23540 and 23546, This court will defer to the legislature's judgment as to the necessity and reasonableness of the amended statutes.

CONCLUSION

Based upon the foregoing, the defendant's motion to strike a prior conviction from the complaint is denied.

The defendant shall appear on October 27, 2006) in the above entitled court at 8:30 A.M. for further arraignment.

Dated: October 2, 2006

//S//
Stephen B. Sefton,
Commissioner

NOT TO BE PUBLISHED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

APPELLATE DIVISION

JASON MICHAEL FORRESTER, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF SAN LUIS OBISPO, Respondent.	Case No. M385438A ORDER AFFIRMING JUDGMENT OF CONVICTION

STATEMENT OF FACTS

This appeal involves the proper application of a driving-under-the-influence ("DUI") sentencing enhancement. In 1997, Vehicle Code Sections 23540 and 23546 provided that DUI-related convictions could be used to increase the punishment for subsequent DUI convictions for no longer than seven years. However, on September 16, 2004, the California Legislature amended these tow provisions to extend the usage period for prior convictions from seven to ten years. The 2004 amendments became effective on January 1, 2005.

On March 11, 2006, Appellant Jason Michael Forrester ("Forrester or Appellant") was arrested for driving under the influence of alcohol (Vehicle Code

§23152(a)) and for driving with an elevated blood alcohol level (Vehicle Code §23152(b)). His contemporaneous blood alcohol concentration was .18%.

On April 2, 2006, the District Attorney charged Forrester with misdemeanor violations of Vehicle Code §§23152(a) and (b), and also alleged, as a sentencing enhancement, that Forrester had suffered two prior qualifying convictions, one of which was incurred on January 2, 1997, more than seven years prior to his most recent arrest.

On May 16, 2006, Forrester filed a motion to strike his prior convictions, which was opposed by the prosecution. On October 2, 2006, in a written opinion, Forrester's motion to strike was denied by the trial court. On November 3, 2006, Forrester pled no contest to a violation Vehicle Code §23152(b) and admitted the two prior alleged offenses. That same day he filed a notice of appeal. On November 13, 2006, he was granted a certificate of probable cause by the trial court.

DISCUSSION

Appellate claims that the prosecutor's use of his January 2, 1997 driving-under-the-influence conviction violates the ex-post facto clause of the state and federal Constitutions. He also claims that Vehicle Code §§23540 and 23546 violate the due process clause of the federal Constitution and that the state is barred by the doctrine of entrapment by estoppel.

As a starting point, there is plentiful authority stating that statutes imposing increased punishment on recidivists based on crimes that occurred before the habitual offender legislation was enacted do not

violate ex post facto prohibitions. *See, e.g., Gyger v. Burke* (1948) 334 U.S. 728, 732; *People v. Eribarne* (2004) 124 Cal.App,.4th 1463, 1469; *Gonzales v. Superior Court* (1995) 27 Cal.App.4th 1302, 1309; *People v. Hatchis* (1995) 33 Cal.App.4th 1526, 1527-28; *People v. Sweet* (1989) 207 Cal.App.3d 78, 82-85; *People v. Weaver* (1984) 161 Cal.App.3d 119, 124-25.

Generally speaking, there are four criteria that come into play when conducting an ex post facto analysis. As phrased in terms that apply to this case, the four questions are whether the 2005 DUI statute (a) makes criminal an action that was innocent when done; (b) makes more serious an act already criminal when done; (c) inflicts greater punishment than existed when the act was committed; or (d) permits Forrester to be convicted with less evidence than was required when the act was done. See *People v. Weaver*, 161 Cal.App.3d at 124-125, citing *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390.

It is readily apparent that Mr. Forrester's case fits into none of these categories. First, his DUI offenses was indeed a crime under the operative DUI statute when he drove his car on March 11, 2006. Second, the enhanced penalty was already on the books when his criminal act occurred. Third, the punishment Mr. Forrester faces now is the same punishment that was acted in existence in March 2006, when his criminal act was committed. Fourth, the evidence needed to convict him of the crime is the same today as it was on March 11, 2006. In terms of proof, the prosecution still had to prove beyond a reasonable doubt that the Forrester was guilty of driving under the influence, i.e. his identity as the driver erratic driving patterns, failed field sobriety tests, blood levels and other pertinent issues.

Forrester strenuously urges that the Supreme Court's decision in *Stogner v. California* (2003) 539 U.S. 607, changed the legal landscape. In *Stogner* the issue was whether the State of California could, consistent with due process and ex post facto limitations, revive a child molestation prosecution by increasing the duration of the statute of limitations once the original statute had expired. The Supreme Court concluded that California was barred from doing so because the new statute of limitations attached criminal liability to a situation "where the party was not, by law, liable to any punishment" at the time the criminal case was revived. 539 U.S. 613. In other words, California could not belatedly prosecute someone who, for some period of time, was completely immune from prosecution due to the expiration of a statute of limitations.

Stogner does not changed the outcome of this case. There is a criminal difference, one of Constitutional dimension, between receiving a prosecution in its entirety (the situation in *Stogner*) and enhancing the sentence in a new criminal prosecution based upon new criminal conduct (this case). Unlike the situation in *Stogner*, Mr. Forrester has never been free of criminal liability. His prosecution is based on a law that became effective more than one year before the date of his first arrest, and one that apprised him of the possible consequences of a new violation.

It is true that Mr. Forrester's penalty is increased based upon his pre-existing conviction. However, this is not, as Forrester claims, a statute of limitations issue. Forrester was convicted of his earlier DUI charge, and completed his sentence in that case long before the 2005 Legislation was enacted. Courts have routinely rejected ex post facto

challenges to statutes, like this one, having increased penalties for recidivist behavior. These courts reason that the sentence imposed upon a habitual offender is not an additional punishment for the earlier crime, but rather a stiffened penalty for the later crime, which is aggravated because of its repetitive nature. See e.g. *People v. Eribarne* (2004) 124 Cal.App,.4th 1463, 1469 (Three strikes law); *Gonzales v. Superior Court* (1995) 27 Cal.App.4th 1302, 1309 (same); *People v. Hatchis* (1995) 33 Cal.App.4th 1526, 1527-28 (same);-85; *People v. Weaver* (1984) 161 Cal.App.3d 119, 124-25 (upholding 5-year felony enhancement).

Forrester maintains that this case is different from other recidivist cases because the earlier DUI statute under which Mr. Forrester was convicted had a 7-year "sunset" or "washout" provision that should prevent the State from alleging his 1997 conviction as a prior after it "expired' in 2004. However, the Court agrees with the discussion in *Sweet* 207 Cal.App.3d at 83, that the "washout" provision is a distinction without a substantive difference as far as the ex post facto analysis is concerned.

Without question there is some superficial unfairness in the legislature's decision to change its mind and extend the "washout" period from seven to ten years well after Mr. Forrester entered his plea on January 2, 1997. To some extent the legislature is changing the deal more than seven years after the fact. However, the legislature's decision is not, for several reasons, so fundamentally unjust as to violate due process. *Sweet*, 207 Cal.App 3d at 83-86. First, citizens are presumed to know the law. *People v. Hgedorn* (2005) 127 Cal.App.4th 734, 748; *Rhodes v. Sargent* (1911) 17 Cal.App. 54, 58. As of January 2005, Mr. Forrester was on either actual or presumed notice that his punishment might be increased if he

re-offended. He should have adjusted his conduct accordingly. Second, although Mr. Forrester may well have been advised of the then-existing "washout" period, there is no evidence that he entered his earlier plea in specific reliance upon his ability to commit future crimes without having that earlier offense come back to haunt him. *Sweet*, 207 Cal.App.3d at 83-86. Third, any such reliance would be unreasonable under the law. The "washout" advisement is at best a collateral consequence of his plea. Id. At 85-86.

Lastly, entrapment by estoppel does not fit under the facts presented. As stated there is no evidence in the record that Mr. Forrester reasonably relied on any assurance given to him by anyone. See *Sweet*, 207 Cal.App.3d at 85; compare *Cox v. Louisiana* (1965) 379 U.S. 59 (entrapment by estoppel arose from explicit personal statement by chief of police). [1]

The Court sees no constitutional infirmities in the 2005 DUI statute and finds no fundamental unfairness in subjecting Mr. Forrester to an increased period in which a court may consider his 1997 DUI conviction.

The Judgment of conviction is affirmed.

DATED: March 23, 2007

//S//

CRANDALL, J.

[1] The unsigned Plea of Guilty and Waiver of Rights Form (Exhibit A), apparently dated weeks after Forrester's 1997 plea, does not support Forrester's argument that he reasonably relied on some prosecutorial assurance or that entrapment by estoppel should come into play.

WE CONCUR:

//S//	//S//
LABARBAERA, P.J.	PIQUET, J.

Court of Appeal, Second Appellate District, Div. 6 –
No. B198662
S159176

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JASON MICHAEL FORRESTER, Defendant and Appellant.	2d Crim. No. B198662 (Super. Ct. No. M385438A) (San Luis Obispo County)

In *People v. Sweet* (1989) 207 Cal.App.3d 78 (*Sweet*), defendant pled guilty to driving under the influence of alcohol (DUI). At the time of his plea, a defendant convicted of a subsequent DUI offense within five years receives increased punishment. After Sweet's plea, the Legislature amended the statute to extend the five years to seven years. Sweet reoffended more than five but less than seven years later. In *Sweet*, we held that the statute may constitutionally be applied to prior DUI convictions

entered when five years was the maximum period in which prior convictions could be used for increased sentence. (*Id.* at p. 83.)

Jason Michael Forrester is in a similar predicament. The statute was again amended to extend the seven years to ten years. (Veh. Code, §§ 23540 & 23546.) Faced with the seemingly insuperable *Sweet* precedent, Forrester asks us to reexamine our holding in light of *Stogner v. California* (2003) 539 U.S. 607. We have, and conclude nothing has changed. Forrester's enhanced sentence does not violate ex post facto or due process principles. We affirm the judgment.

Factual and Procedural Background

Forrester suffered two DUI convictions, one in 1997 and another in 2001. In 1997, sections 23540 and 23546 provided that DUI-related convictions increase punishment for subsequent DUI convictions occurring within seven years. Effective January 1, 2005, the California Legislature amended these statutes to extend the period to 10 years.

In March 2006, Forrester was again charged with DUI offenses. (§§ 23152, subd. (a) & 23152, subd. (b).) The People alleged his two prior convictions to enhance his sentence.

Forrester moved to strike his prior 1997 conviction. He argues, as did defendant Sweet, that to enhance his sentence with this prior conviction violates the ex post facto clause. The trial court denied the motion and Forrester pled no contest to a violation of section 23152, subdivision (b), and admitted the two prior convictions. He was sentenced to confinement in county jail. The trial court stayed execution of his sentence pending appeal and

granted him a certificate of probable cause.

The Appellate Division of the Superior Court affirmed. It concluded that use of the 1997 prior conviction to enhance Forrester's sentence does not violate ex post facto principles. We granted Forrester's request to transfer the case here for resolution of the constitutional issues.

Ex Post Facto Clause and Due Process

Forrester acknowledges our analysis in *Sweet* and other precedent. Ex post facto laws (1) criminalize formerly innocent actions after their commission; (2) aggravate a crime after its commission; (3) increase the punishment associated with the crime after its commission; or (4) alter the legal rules of evidence required to convict the offender. (*Miller v. Florida* (1987) 482 U.S. 423, 429; *Sweet, supra*, 207 Cal.App.3d at p. 82.) "Statutes enacting punishment for a defendant convicted of violating section 23152 with prior convictions do not have the effect of being ex post facto laws. [Citations.] It is the law in effect at the time of commission of the offense which controls. [Citations.]" (*Sweet*, at p. 82.)

In 2006, when Forrester committed the current DUI offense, the law provided that an individual with prior section 23103.5 convictions within the last 10 years would be subject to enhanced punishment if convicted of violating section 23152, subdivision (a). (§§ 23540, 23546 & 23550.) "There is no constitutional bar preventing application of the statute to later offenses solely because the prior conviction which serves as a basis for enhancement was committed before the habitual offender statute was enacted." (*Sweet, supra*, 207 Cal.App.3d at p. 83)

The crime Forrester is punished for is not the prior conviction, "but the subsequent offense of which the prior conviction constitutes only one element. [Citation.]" (*Ibid.*)

Courts have routinely rejected ex post facto challenges to statutes that increase penalties for recidivism. Courts reason that the sentence imposed upon a habitual offender is not an additional punishment for the earlier crime, but a punishment for the later crime, which is aggravated because of its repetitive nature. (See, e.g., *Gryger v. Burke* (1948) 334 U.S. 728, 732; *People v. Snook* (1997) 16 Cal.4th 1210, 1221; *People v. Eribarne* (2004) 124 Cal.App.4th 1463, 1469 [three strikes law]; *People v. Wohl* (1991) 226 Cal.App.3d 270, 273 [rejecting ex post facto contention where DUI conviction is elevated to felony on fourth conviction].). Additionally, it is well established that even expungement of a conviction will not eliminate all consequences associated with that conviction. (*People v. Jacob* (1985) 174 Cal.App.3d 1166, 1173.)

Forrester argues that *Sweet* is no longer good law because *Stogner v. California, supra*, 539 U.S. 607, compels a different result. In *Stogner*, the State of California attempted to revive the statute of limitations for the crime of child molestation after the original statute of limitations had expired. The United States Supreme Court held that California was barred from doing so because the new statute of limitations attached criminal liability "'. . . where the party was not, by law, liable to any *punishment*.'" (*Id.* at p. 613.)

The Appellate Division correctly noted the difference between reviving a prosecution in its entirety after the statute of limitations has run, and enhancing the sentence in a *new* criminal prosecution

stemming from *new* criminal conduct. Here Forrester's prosecution stems from a law that became effective more than one year before the date of his arrest, and one that apprised him of the possible consequences of a new violation. Unlike *Stogner*, Forrester has not been charged with a crime for which the statute of limitations has run. He has not been deprived of a "vested defense" because the statute extending the maximum period of prior offenses was enacted before the current offense. (See *Sweet, supra*, 207 Cal.App.3d at pp. 82, 86.)

Violation of Forrester's 1997 Plea Agreement and Estoppel

Forrester next contends that the plea agreement he signed in 1997 is a contract in which the district attorney promised he would receive an enhanced sentence only for DUI offenses committed within seven years. He relies on language in the plea form stating that the court and counsel advised him of the elements of the offense, the possible defenses, and the direct consequences of his plea, including the minimum and maximum sentences listed on a chart appearing on the second page of the plea form. A chart lists the penalties for DUI convictions effective January 1, 1994, depending upon the number of prior DUI offenses committed within the previous seven years. The chart simply provides information concerning the relevant law at that time. No language in the plea agreement, nor any evidence supports the contention that Forrester relied on the information in the chart in entering his plea. Nor would such reliance have been reasonable.

For these reasons, there is no merit to Forrester's contention the state is estopped from

using his 1997 conviction. (See *Hair v. State of California* (1991) 2 Cal.App.4th 321, 328-329.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J., COFFEE, J.
Stephen B. Sefton, Judge

Superior Court County of San Luis Obispo

Law Offices of Tony Marlow, Anthony J. Marlow and Midori Hill Feldman, for Defendant and Appellant.

Gerald T. Shea, District Attorney, Kathleen Philpot Secrest, Deputy District Attorney, County of San Luis Obispo, for Plaintiff and Respondent.

IN THE SUPREME COURT OF CALIFORNIA
En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JASON MICHAEL FORRESTER, Defendant and Appellant

The Petition for review is denied.

SUPREME COURT
FILED

FEB 20, 2008

Frederick K. Ohlrich, Clerk

Deputy

//S//
Chief Justice